

The Honorable Rosanna Malouf Peterson

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

CARL H. PLUMB,

Plaintiff,

v.

BARCLAYS BANK DELAWARE;  
FIRSTSOURCE ADVANTAGE, LLC;  
COLLECTCORP CORPORATION;  
PLAZA ASSOCIATES aka AID  
ASSOCIATES, INC.; FINANCIAL  
RECOVERY SERVICES, INC.  
PHILLIPS & COHEN ASSOCIATES,  
LTD.,

Defendants,

NO. 2:11-CV-03090-RMP

MEMORANDUM OF POINTS  
AND AUTHORITIES IN  
SUPPORT OF THE MOTION  
FOR SUMMARY JUDGMENT,  
OR ALTERNATIVELY  
FOR JUDGMENT ON THE  
PLEADINGS OF FINANCIAL  
RECOVERY SERVICES, INC.

**INTRODUCTION**

Defendant Financial Recovery Services, Inc. ("FRS") submits this memorandum of law in support of its motion for summary judgment, or alternatively for judgment on the pleadings.

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## LEGAL ARGUMENT

### **I. LEGAL STANDARD.**

#### **A. Fed. R. Civ. P. 12(c) Standard**

"Judgment on the pleadings is proper when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law." *Hal Roach Studios, Inc. v. Richard Feiner and Co., Inc.*, 896 F.2d 1542, 1550 (9th Cir. 1990). The standard applied on a Rule 12(c) motion is essentially the same as that applied on a Rule 12(b)(6) motion for failure to state a claim: "the allegations of the non-moving party must be accepted as true, while the allegations of the moving party which have been denied are assumed to be false." *Id.*

#### **B. Fed. R. Civ. P. 56 Standard**

Summary judgment is proper where the pleadings and materials demonstrate "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The moving party bears "the initial responsibility of informing the district court of the basis for its motion."

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1 *Celotex*, 477 U.S. at 323. However, the moving party is not required to negate  
 2 those portions of the non-moving party's claim on which the non-moving party  
 3 bears the burden of proof. *Id.* at 323. To withstand a motion for summary  
 4 judgment, the non-movant must then show that there are genuine factual issues  
 5 which can only be resolved by the trier of fact. *Reese v. Jefferson Sch. Dist. No.*  
 6 *14J*, 208 F.3d 736, 738 (9th Cir. 2000) (citing Fed.R.Civ.P. 56; *Celotex*, 477  
 7 U.S. at 323).

## 11 **II. LEGAL ANALYSIS**

12 Plaintiff has alleged that FRS has violated the Fair Debt Collection  
 13 Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.*, the Telephone Consumer  
 14 Protection Act ("TCPA"), 47 U.S.C. § 227 *et seq.*, and RCW 9.73.030.<sup>1</sup>  
 15 However, each and every claim against FRS fails, as will be established below.

### 18 **A. FRS Did Not Violate The FDCPA.**

19 Plaintiff's claims against FRS fail in their entirety because (1) Plaintiff  
 20 has failed to adequately plead any violations by FRS, (2) FRS was not required  
 21

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23 <sup>1</sup> Notably, Plaintiff also alleges violations of RCW 19.86 *et seq.* and 19.16 *et seq.*  
 24 However, as these claims are all predicated on the alleged violations of the FDCPA, TCPA,  
 25 and RCW 9.73.030, these claims also fail. Also, Count II of Plaintiff's Complaint claims  
 violations of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.*, but that  
 claim is not directed at FRS.

1 to validate Plaintiff's debt upon his dispute, (3) FRS was entitled to rely upon  
 2 the debt information provided to it, (4) FRS does not credit report, (5) FRS'  
 3 messages conveyed that it was a debt collector and properly identified itself,  
 4 and (6) FRS' phone calls to Plaintiff do not amount to harassment.

5  
 6  
 7 **1. Plaintiff has failed to allege any activity by FRS that would support**  
 8 **most of his claims.**

9 In Plaintiff's Complaint, the factual allegations directed solely to FRS  
 10 provide that: (1) FRS sent a letter to Plaintiff, (2) Plaintiff sent FRS a letter  
 11 disputing the debt, (3) FRS did not respond to Plaintiff, and (4) FRS made at  
 12 least four phone calls to Plaintiff. Pl. Compl. ¶¶ 29, 30, and 52(d).

13  
 14 **2. FRS was not required to validate Plaintiff's debt upon receipt of his**  
 15 **dispute.**

16 Plaintiff asserts that FRS violated §§ 1692e, 1692g, and 1692d because it  
 17 failed to provide him with validation of the debt upon his dispute. However,  
 18 Courts, including the Ninth Circuit, have unanimously confirmed that a debt  
 19 collector can either cease collection efforts or provide verification upon receipt  
 20 of a valid dispute. Thus, contrary to Plaintiff's claim, a debt collector is not  
 21 required to verify the debt, but instead may cease all collection activity on the  
 22 debt. *See Guerrero v. RJM Acquisitions, LLC*, 499 F. 3d 926, 2007 U.S. App.

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1 LEXIS 20072, at \*35-36 (9th Cir. Aug. 23, 2007); *Sambor v. Omnia Credit*  
 2 *Servs., Inc.*, 183 F.Supp.2d 1234, 1243 (D. Haw. 2002).<sup>2</sup>  
 3

4 In addition, in *Donahue v. Nielson*, the Washington Court of Appeals  
 5 held that a debtor was entitled to only one validation notice. 161 Wash. App.  
 6 606, 613, 255 P.3d 760, rev. denied, 172 Wn.2d 1012 (2011); see also *See Ditty*  
 7 *v. CheckRite, Inc.*, 973 F. Supp. 1320, 1329 (D. Utah 1997) ("Section 1692g  
 8 does not require another debt collector, undertaking collection efforts after a  
 9 validation notice has been timely sent, to provide additional notice and another  
 10 thirty-day validation period."). Accordingly, as Plaintiff concedes that he  
 11 received validation notices from other entities (see Pl. Compl. generally),  
 12  
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 14  
 15

16 <sup>2</sup> The FTC has confirmed that a debt collector may cease collection activity without  
 17 providing verification. A 1997 FTC Informal Staff Opinion Letter agreed that it is  
 18 permissible under the FDCPA to cease collection of a debt rather than respond to a written  
 19 dispute from a consumer received during the 30-day validation period. *Cass*, FTC Informal  
 20 Staff Letter (Dec. 23, 1997). Specifically, the FTC stated that "[t]here is nothing in the  
 21 FDCPA that requires a response to a written dispute if the debt collector chooses to abandon  
 its collection effort with respect to the debt at issue. *Id.* (citing *Smith*, 953 F.2d at 1032).  
 Similarly, another FTC informal opinion letter states that when a debt collector receives a  
 request for verification and decides not to pursue further collection efforts, "there is no  
 requirement to furnish the documentation of the indebtedness to the consumer." *Krison*, FTC  
 Informal Staff Letter (Mar. 3, 1992).

22 Although the opinions of the FTC are not binding on the Court, the FTC is the  
 23 administrative body charged with enforcement of the FDCPA (pursuant to 15 U.S.C. §  
 1692l) and courts have found FTC opinions to be helpful and persuasive. See, e.g., *Romine v.*  
 24 *Diversified Collection Serves., Inc.*, 155 F.3d 1142, 1147 & nn.3, 5 (9th Cir. 1998) (finding  
 25 an informal FTC staff letter interpreting the FDCPA to be persuasive); *Bass v. Stolper,*  
*Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322, 1327 n.8 (7th Cir. 1997) (giving due  
 weight to an FTC opinion interpreting the FDCPA).

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1 Plaintiff was not entitled to request and obtain validation from subsequent  
2 collectors, including FRS.  
3

4 Moreover, FRS took no further action to collect on the debt after receipt  
5 of Plaintiff's dispute, opting instead to close its file. As this is permissible, FRS  
6 cannot be found to have violated any provision of the FDCPA on these grounds  
7 and FRS is entitled to judgment in its favor, regarding Plaintiff's claims that  
8 FRS failed to validate the debt.  
9  
10

11 **3. FRS was entitled to rely upon the debt information provided to it.**

12 Plaintiff further alleges that FRS violated §§ 1692e(2)(A) and 1692f(1)  
13 because FRS allegedly sought to collect an amount not authorized. However,  
14 an abundance of case law sets forth that the amount a debt collector may seek to  
15 collect is the amount that the creditor represents as being "authorized" (i.e., the  
16 creditor's interpretation of the agreement giving rise to the debt which  
17 establishes the debt and the amount owed). *See e.g., Duffy v. Landberg*, 215  
18 F.3d 871 (8th Cir. 2000); *Johnson v. Riddle*, 305 F.3d 1107 (10th Cir. 2002);  
19 *Axtell v. Collections USA, Inc.*, No. CV-02-536-PHX-DKD, 2002 WL  
20 32595276 (D. Ariz. Oct. 22, 2002). Within reasonable limits, a debt collector is  
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entitled to rely on its client's statements concerning the balance of a debt.  
*Clark v. Capital Credit & Collection Services, Inc.*, 460 F.3d 1162, 1174 (9th Cir. 2006) (citing *Bleich v. Revenue Maximization Group, Inc.*, 233 F. Supp. 2d 496, 500-01 (E.D.N.Y. 2002)), *Beattie v. D.M. Collections, Inc.*, 754 F. Supp. 383, 392 (D. Del. 1991). The FDCPA does not impose upon a debt collector any duty to independently investigate the claims presented by its clients. *Id.*

A debt collector should be able to rely on the representation and implied warranty from its client that the amount was due under the lease or the law. The FDCPA does not require an independent investigation of the information provided by clients when a debt collector tries to collect a debt, nor does it require the debt collector to dispute the creditor's construction of a contract. *Axtell v. Collections USA, Inc.*, 2002 WL 32595276, at \*8.

"Courts do not impute to debt collectors other information that may be in creditors' files -- for example, that debt has been paid or was bogus to start with." *Randolph v. IMBS, Inc.*, 368 F.3d 726, 729 (7th Cir. 2004).

"Verification would be unnecessary if debt collectors were charged with the creditors' knowledge." *Id.* The *Randolph* Court further stated that "[w]e have not found any appellate opinion imputing creditors' knowledge to debt

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collectors.” *Id.*

In this matter, FRS sought to collect the amount claimed by Barclay’s and relied upon the same. Bowers Aff. ¶ 6. Thus, FRS did not violate the FDCPA with respect to Plaintiff’s claims that FRS sought to collect an authorized amount.

#### 4. FRS does not credit report

Plaintiff further alleges that FRS violated § 1692e(8), which prohibits collectors from

Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.

15 U.S.C. § 1692e(8). FRS does not credit report or otherwise furnish information to any credit reporting agency. Bowers’ Aff. ¶ 26. Courts have held that the duty to report that an account is disputed under § 1692e(8) only arises if one elects to report credit information. *See Wilhelm v. Credico, Inc.*, 519 F.3d 416 (8<sup>th</sup> Cir. 2008) (citing to FTC Staff Commentary, 53 Fed.Reg. 50097-02, 50106 (Dec. 13, 1988)); *Black v. Asset Acceptance, LLC*, 2005 U.S. Dist. LEXIS 43264 at \* 12-13 (N.D.Ga.2005), and in *Hilburn v. Encore*

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1 *Receivable Mgmt., Inc.*, 2007 WL 1200949 at \*4 (D.Or.2007). In *Wilhelm*, the  
 2 Court held that the plaintiff's § 1692e(8) claim failed because the plaintiff  
 3 failed to produce any evidence that the defendant had reported any information  
 4 after receipt of a dispute. *Wilhelm*, 519 F.3d at 418.

5  
 6 In this matter, Plaintiff simply cannot produce any evidence illustrating  
 7 that (1) FRS furnished any information to the credit bureaus that would rebut  
 8 the evidence submitted via the Affidavit of Brian Bowers, or (2) furnished any  
 9 information to the credit bureaus after receipt of Plaintiff's dispute.  
 10

11 Accordingly, Plaintiff's § 1692e(8) claim fails.  
 12

13 **5. FRS' messages conveyed its name and that it was a debt**  
 14 **collector.**

15 Plaintiff also alleges that FRS violated §§ 1692d(6) and 1692e(11) by  
 16 failing to identify itself in calls to Plaintiff and by failing to advise that it was a  
 17 debt collector. However, as indicated in the facts above, FRS' messages to  
 18 Plaintiff provided its name, "Financial Recovery Services, Incorporated", the  
 19 name of the debt collector who placed the call, and stated that FRS was a debt  
 20 collection company, that the call was an attempt to collect a debt, and that any  
 21 information obtained would be used for that purpose. Given FRS' evidence,  
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1 Plaintiff cannot now simply rely upon his conclusory allegations. Rather,  
 2 Plaintiff must now come forward with evidence that actually rebuts the  
 3 evidence submitted by FRS. As no such evidence exists, Plaintiff's claims that  
 4 FRS failed to identify itself and provide the required notice fails.  
 5

6 **6. FRS did not harass Plaintiff**

7  
 8 Plaintiff asserts that FRS harassed him, therefore violating §§1692d and  
 9 § 1692d(5) by continuing attempts to collect Plaintiff's debt via referral of the  
 10 matter to other agencies and by making numerous calls to Plaintiff with the  
 11 intent to harass. As will be discussed below, both claims fail.  
 12

13 **i. FRS' actions were not generally harassing**

14  
 15 In finding that a claim of harassment failed under § 1692d, the Ninth  
 16 Circuit has stated that:

17  
 18 15 U.S.C. § 1692d sets out six examples of conduct that violates  
 19 the section:

- 20 (1) The use or threat of use of violence or other criminal  
 21 means to harm the physical person, reputation, or property  
 22 of any person.  
 23 (2) The use of obscene or profane language or language the  
 24 natural consequence of which is to abuse the hearer or  
 25 reader.  
 26 (3) The publication of a list of consumers who allegedly  
 27 refuse to pay debts, except to a consumer reporting agency

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1 or to persons meeting the requirements of section 1681a(f)  
2 or 1681b(3) of this title.

3 (4) The advertisement for sale of any debt to coerce payment  
4 of the debt.

5 (5) Causing a telephone to ring or engaging any person in  
6 telephone conversation repeatedly or continuously with  
7 intent to annoy, abuse, or harass any person at the called  
8 number.

9 (6) Except as provided in section 1692b of this title, the  
10 placement of telephone calls without meaningful disclosure  
11 of the caller's identity.

12 The statute does not limit its general application to these examples.  
13 However, normal rules of statutory construction require that the  
14 harassment or abuse condemned be of the same nature as the  
15 examples the statute supplies. The Foxes provided no testimony  
16 showing that the defendants' conduct was of this quality. At most,  
17 Toni Fox could recall a telephone call from a Citicorp agent whose  
18 voice she described as "intimidating," "aggressive," "threatening"  
19 or "not nice." At the point she received this call the Foxes had  
20 failed for over three years to pay the debts due on their Citibank  
21 credit cards. Several months before the telephone call the Foxes  
22 had agreed to a stipulated judgment requiring them to pay the full  
23 unpaid balance of \$2,300.31 in monthly installments of \$100  
24 apiece, with the additional stipulation that if the payments were not  
25 timely made the entire judgment, plus interest, court costs, and  
26 attorneys' fees would be due. Months went by without the Foxes  
27 paying a penny. Under these circumstances a telephone call from a  
28 representative of Citibank would have been very intimidating, and  
her voice would have sounded "not nice." It might even have been  
considered "aggressive." There is nothing in the statute that  
restrains a creditor from attempting to collect from a delinquent  
debtor or makes a reminder to the debtor an act of harassment.

*Fox v. Citicorp Credit Services, Inc.*, 15 F.3d 1507, 1518 (9<sup>th</sup> Cir. 1994).

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Indeed, other courts have found that generally rude behavior is not a violation of § 1692d. *See e.g., Unterreiner v. Stoneleigh Recovery Assoc., LLC*, 2010 WL 252357, \*2 (N.D. Ill., June 17, 2010) (dismissing § 1692d claim where the allegations were that defendant screamed at plaintiff, told her that she “owed all kinds of money” and asked “how could you go out and max out a card like that?”); *Bassett v. I.C. System, Inc.*, 2010 WL 2179175, \*3 (N.D. Ill.) (awarding defendant summary judgment where the evidence showed that “on one occasion during a telephone call, a debt collector called him a liar, laughed at him, and accused him of trying to make excuses to get out of paying his debt.”); *Guarjardo v. GC Services, LP*, 2009 WL 3715603, \*1 (S.D. Tex) (granting defendant summary judgment where defendant’s employee called plaintiff a “liar” and stated, “I can tell the kind of life you live by the fact that you don’t pay your bills on time.”); *Thomas v. LDG Fin. Servs., LLC*, 463 F.Supp.2d 1370, 1372 (N.D.Ga. 2006) (dismissing § 1692d claim where debt collector stated “they were going to get their money one way or the other” and plaintiff alleged that the debt collector “yelled” and “screamed” at her.); *Majeski v. I.C. System, Inc.*, 2010 WL 145861, \*4 (N.D. Ill.) (“Yelling and rude language, while disrespectful, does not by itself violate § 1692d.”).

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1 Accordingly, FRS' attempts to collect a debt from Plaintiff, absent some  
 2 showing of behavior that is similar to the examples set forth in § 1692d, was not  
 3 harassing and Plaintiff's claim to the contrary fails.  
 4

5 **ii. FRS calls to Plaintiff were not harassing.**

6 Plaintiff asserts that FRS called him at least four times. By its own  
 7 records, FRS concedes that it called Plaintiff on ten occasions upon the  
 8 placement of the Account with its office. Bowers' Aff. ¶ 10-15, Ex. B.  
 9 Whether there is actionable harassment or annoyance under Section 1692d(5)  
 10 turns not only on the volume of calls made, but also the frequency and  
 11 persistence of calls. *See Martin*, 2008 WL 618788 at \*6; *Lovelace v. Stephens*  
 12 & *Michaels, Assocs., Inc.*, 2007 WL 3333019 at \*7 (E.D. Mich. Nov. 9, 2001);  
 13 *Sanchez v. Client Servs., Inc.*, 520 F.Supp.2d 1149, 1161 (N.D. Cal. 2007);  
 14 *Joseph v. J.J. MacIntyre Cos., LLC*, 238 F.Supp.2d 1158, 1168 (N.D. Cal.  
 15 2002). "Although a court may consider the 'frequency, persistence, and volume  
 16 of the telephone calls' to determine intent, the mere fact that a call is  
 17 unwelcome is 'insufficient to constitute a violation of the FDCPA.'" *Hicks v.*  
 18 *America's Recovery Solutions, LLC*, --- F. Supp. ---, 2011 WL 4540755 at \*6  
 19 (N.D. Ohio Sept. 29, 2011) (*citing Martin*, 2008 WL 618788 at \*6). "Further, a  
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1 significant disparity between the number of telephone calls placed by the  
 2 defendant and answered by the plaintiff may suggest difficulty in reaching the  
 3 plaintiff rather than intent.” *Id.* (citing *Saltzman v. I.C. Systems, Inc.*, 2009 WL  
 4 3190359 at \*7 (E.D. Mich. Sept. 30, 2009).

5  
 6 While there is no bright-line rule, several recent cases provide guidance  
 7 as to what frequency, volume and pattern of calls constitutes harassment under  
 8 Sections 1692d and 1692d(5) and have held that significantly more telephone  
 9 calls than those allegedly made by CPC to Plaintiff failed to establish a claim  
 10 for a violation of Section 1692d(5). *See Tucker v. The CBE Group, Inc.*, 2010  
 11 WL 1849034 (M.D. Fla.) (57 calls to non-debtor, including 7 on one day, only 6  
 12 messages left in total was not a violation); *Arteaga v. Asset Acceptance, LLC*,  
 13 2010 WL 3310259 (E.D. Cal.) (allegations of "daily" or "nearly daily" phone  
 14 calls alone do not raise an issue of fact as to these claims); *Saltzman v. I.C.*  
 15 *Systems, Inc.*, 2009 WL 3190359 at \*6-7 (E.D. Mich.) (20-50 unsuccessful  
 16 calls, 2-10 successful calls in one month not a violation); *Jiminez v. Accounts*  
 17 *Receivable Mgmt., Inc.*, 2010 WL 5829206 (C.D. Cal.) (69 calls over 115 days,  
 18 no live contact, one voice mail left, no more than 2 calls/day, except for a single  
 19 day in which there were 3 calls is not a violation); *Waite v. Financial Recovery*

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1 *Services, Inc.*, 2010 WL 5209350 (M.D. Fla.) (holding that 132 calls over 7  
 2 months was not a violation of the FDCPA); *Jones v. Rash Curtis & Associates*,  
 3 2011 WL 2050195 (N.D. Cal.) (holding that 200 calls over a year is not a  
 4 violation); *Carmen v. The CBE Group, Inc.*, 2:09-cv-02538, Doc. No. 57, J.  
 5 Robinson (D. Kan, Mar 23, 2011) (holding that 149 calls over a two month  
 6 period is not a violation); *Katz v. Capital One*, 2010 WL 1039850 (E.D. Va.)  
 7 (15-17 calls after creditor notified of attorney representation, not more than 2  
 8 calls/day, no inconvenient times, no requests to stop, no calls after consumer  
 9 hangs up held not a violation).  
 10  
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13 In this instance, FRS' ten calls to Plaintiff were not harassing. FRS never  
 14 spoke with Plaintiff and Plaintiff never advised FRS that its calls were  
 15 bothering him. Accordingly, Plaintiff's claim under § 1692d(5) fails.  
 16  
 17

18 **B. FRS Did Not Violate The TCPA.**

19 Plaintiff also asserts that FRS violated the TCPA by calling him at both  
 20 his home residential number and on his personal cell phone, without permission  
 21 to do so. Moreover, Plaintiff asserts that because his numbers were registered  
 22 with the "National Do Not Call Registry", all calls to him were impermissible.  
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25 The TCPA provides that:

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1 It shall be unlawful for any person within the United States, or any  
 2 person outside the United States if the recipient is within the  
 3 United States –

4 (A) to make any call (other than a call made for emergency  
 5 purposes or made with the prior express consent of the  
 6 called party) using any automatic telephone dialing system  
 or an artificial or prerecorded voice \*\*\*\*\*

7 (iii) to any telephone number assigned to a paging service,  
 8 cellular telephone service, specialized mobile radio  
 9 service, or other radio common carrier service, or any  
 10 service for which the called party is charged for the call;

11 (B) to initiate any telephone call to any residential telephone  
 12 line using an artificial or prerecorded voice to deliver a  
 13 message without the prior express consent of the called  
 14 party, unless the call is initiated for emergency purposes  
 15 or is exempted by rule or order by the [Federal  
 Communications Commission, “FCC”] under paragraph  
 (2)(B).

16 47 U.S.C. § 227(b)(1)(A)-(B).

17  
 18 For starters, FRS did not use an automated dialing system to call  
 19 Plaintiff’s 0834 number, which it believes is Plaintiff’s cell phone number. As  
 20 indicated in its notes, calls to Plaintiff’s 0834 number were made by collectors  
 21 with initial of CAA, BAA, and BHJ. Bowers’ Aff. ¶ 17. Ex. B. None of the  
 22 calls to the 0834 number were made using an autodialer. As such, FRS could  
 23 not have violated the TCPA with regard to calls to Plaintiff’s cell phone.  
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1 Second, as to Plaintiff's claim that FRS impermissibly called him on his  
 2 home phone without express consent, FRS refers to Plaintiff's credit  
 3 application, which plainly sets forth Plaintiff's home number. By having  
 4 provided consent to the creditor, Plaintiff is deemed to have consented to calls  
 5 from FRS. More importantly, debt collection calls to a home number are  
 6 exempt from the TCPA and a growing number of courts have confirmed the  
 7 same. In one such case, the court stated that:

11 On the other hand, in 1992 the FCC stated, without qualification,  
 12 that "all debt collection circumstances involve a prior or existing  
 13 business relationship," 7 FCC Rcd. at 8771 (emphasis added), and  
 14 it has not chosen in the succeeding years to modify this categorical  
 15 pronouncement. Thus, other courts have accepted that this  
 16 statement applies even to calls to non-debtors. *See, e.g., Meadows*  
 17 *v. Franklin Collection Serv., Inc.*, 2010 WL 2605048, at \*6 (N.D.  
 18 Ala. 2010) ("***[T]he FCC has determined that all debt collection***  
 19 ***circumstances are excluded from the TCPA's coverage.*** This  
 20 finding is broad enough to cover a debt collection activity that  
 21 contacts a non-debtor."); *Meadows v. Franklin Collection Serv.,*  
 22 *Inc.*, 2011 WL 479997, at \*4 (11th Cir. 2011) ("***[T]he FCC has***  
 23 ***determined that all debt-collection circumstances are excluded***  
 24 ***from the TCPA's coverage, and thus the exemptions apply when***  
 25 ***a debt collector contacts a non-debtor in an effort to collect a***  
 26 ***debt.***").

23 We need not decide today whether the exemption under 47 C.F.R.  
 24 § 64.1200(a)(2)(iv) respecting established business relationships  
 25 applies to debt collection calls to non-debtors, however, because  
 26 there is no controversy as to the applicability of §

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64.1200(a)(2)(iii) to such calls. *Calls made purely for the purpose of collecting a debt clearly constitute calls "made for a commercial purpose" that "do[] not include or introduce an unsolicited advertisement or constitute a telephone solicitation,"*<sup>[5]</sup> § 64.1200(a)(2)(iii), whether they are made to a debtor or non-debtor. Thus, we are aware of no court that has concluded that § 64.1200(a)(2)(iii) does not apply to debt collection calls to non-debtors. *See, e.g., McBride v. Affiliated Credit Servs., Inc.*, 2011 WL 841176, at \*3 (D. Or. 2011) ("While I certainly agree that non-debtors lack a prior business relationship with a debt collector, according to the Commission debt collection calls are not solicitations or advertisements and thus fall within a recognized exemption."); *Santino v. NCO Fin. Sys.*, 2011 WL 754874, at \*6 (W.D.N.Y. 2011) ("[T]he court concludes that the conduct on the part of defendant complained of in this case fits squarely within the exemption provided in 47 C.F.R. § 64.1200(a)(2)(iii)).").

*Anderson v AFNI, Inc.* 2011 WL 1808779 (E.D. Pa.) (emphasis added).

Accordingly, as FRS' calls to Plaintiff were not solicitations, but made in attempts to collect a debt, they are exempt from TCPA coverage.

Still further, Plaintiff seemingly asserts that because his numbers had been listed with the National Do Not Call Registry (Pl. Compl. ¶ 85), they were entitled to additional protection. However, as per the National Do Not Call Registry's website, <https://complaints.donotcall.gov/complaint/complaintcheck.aspx>, debt collectors are not prohibited from calling numbers on the Registry ("Debt

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1 collectors may also continue to call you whether your number is on the Registry  
2 or not.”).

3  
4 **C. FRS Did Not Violate RCW 9.73.030**

5 Plaintiff next asserts that FRS violated RCW 9.73.030, by recording four  
6 phone calls. Pl. Compl. ¶ 101. Section 9.73.030 provides that:  
7

8 (1) Except as otherwise provided in this chapter, it shall be  
9 unlawful ... to intercept, or record any:

10 (a) Private communication transmitted by telephone, telegraph,  
11 radio, or other device between two or more individuals ... without  
12 first obtaining the consent of all the participants in the  
13 communication;

14 (b) Private conversation, ... without first obtaining the consent  
15 of all the persons engaged in the conversation.

16 (citation omitted). However, as set forth above, FRS never spoke with Plaintiff  
17 and Plaintiff has no evidence to the contrary. Accordingly, Plaintiff’s claim  
18 under RCW 9.73.030 fails.  
19  
20  
21  
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26

**CONCLUSION**

In light of the foregoing, FRS respectfully requests that the Court enter judgment in its favor and dismiss Plaintiff's claims against it in their entirety.

DATED this 14th day of December, 2011.

/s/ Stephen A Bernheim

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